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JAMES H. McKE

United States Supreme Court

OCTOBER TERM, 1908.

No. 152.

NORTHERN PACIFIC RAILWAY COMPANY, JOHN A. MILLER AND ANNA MILLER, HIS WIFE, AND THE WASHINGTON GRAIN AND MILLING COMPANY,
Plaintiffs in Error,

vs.

JACOB SEAGHT,

BRIEF FOR PLAINTIFFS IN ERROR.

CHARLES W. BUNN,
JAMES B. KERR,

NORTHERN PACIFIC RAILWAY COMPANY, JOHN A. MILLER AND ANNA MILLER, HIS WIFE, AND THE WASHINGTON GRAIN AND MILLING COMPANY,
Plaintiffs in Error,

vs.

JACOB SLAGHT.

STATEMENT.

This controversy involves the title to a right of way at the town of Palouse, State of Washington, which the plaintiff in error Railway Company claims to own and of which it and its predecessor have been during about twenty years in possession. The Railway Company's title is asserted under the act of Congress of March 3, 1875, granting right of way to railways through the public lands, and rests upon location and construction under that act by the Spokane and Palouse Railway Company, which conveyed to the plaintiff in error. The state court of Washington decided against the right so asserted and this writ was sued out. The opinion of the supreme court of Washington will be found p. 203 Transcript.

No. 153 of this calendar, *Northern Pacific Railway Company et al., Plaintiffs in Error, v. Margaret A. Slaght,* involves identical questions with this case and the two will herein be treated together. The plaintiffs in error in each case, other

than the Railway Company, are its lessees, operating upon the right of way warehouses and other structures connected with the public service of the railway.

The facts are correctly stated in the opinion of the supreme court of Washington, and with one or two exceptions are correctly stated in the findings of the trial court (Transcript, pp. 85-98).

During the year 1886 and the first half of 1887 the Spokane and Palouse Railway Company, a corporation under the laws of the Territory of Washington, which we will for brevity call the Spokane Company, constructed and completed at great expense its railroad upon the premises in dispute; and ever since the railroad has been operated daily, carrying freight, passengers and the mail (Transcript, pp. 93, 203). The Spokane Company sold all its property to the Northern Pacific February 21, 1899, and both companies have claimed at all times a right of way two hundred feet wide under the act of Congress of March 3, 1875. The Spokane Company upon April 26, 1886, complied with the act of 1875 by filing its articles and proofs of its organization and afterward in due time filed its map or profile, and its proofs were duly approved as the act of Congress requires (Transcript, p. 94).

There have been constructed upon the right of way by the Railway Company valuable and lasting improvements, tracks, bridges, water tank and warehouses (Transcript, p. 96). It would be *possible* for the Railway Company to operate upon

a right of way twenty-five feet wide with a space one hundred feet wide for station (Transcript, p. 97), but for the *proper* transaction of its business a two hundred foot right of way is necessary (Transcript, p. 204). The judgment of the state court awards to the Railway Company a right of way 25 feet wide and station grounds 100 feet wide, and denies its right to more.

When the railway was surveyed and built, Jacob Slaght and his wife, Margaret A. (the defendant in error in No. 153) resided upon the lands and saw the railway built by the expenditure of large sums of money (Transcript, p. 204). About the time the railroad surveyors entered upon the lands Slaght published a notice in a newspaper warning all persons not to trespass upon his homestead, which, although his house was fifteen feet from the railway, was the only notice or protest he made until this suit was brought in 1903 (Transcript, p. 96).

The defendant in error and Margaret A. Slaght were husband and wife; in 1883 they settled upon government lots 10, 11, 14 and 15 in section 1, containing the right of way in question, with intent to make a homestead, and have always since lived there (Transcript, p. 86). October 31, 1887, they presented to the land office an application for homestead entry (Transcript, p. 87). But this was after the railway was completed, so that when the railway was built there was no *entry* against the lands.

In our view the foregoing are all the material

facts. But to support an assertion, that this controversy has been once adjudicated, the defendant in error showed and it was found; that the Northern Pacific Company once claimed to own the whole of this section 1 under its land grant; that so claiming it contested Slaght's entry and was defeated in the land department (Transcript, pp. 87-93); that patent was issued to Slaght (Transcript, p. 93) and the Railway Company conveyed the section to one Powers, who made a deed of the right of way to the Spokane Company (Transcript, p. 94); that in 1897, suit was brought by Powers and the Spokane Company against Slaght to have him declared a trustee for plaintiffs of the legal title to said lots 10, 11, 14 and 15 (Transcript, p. 94); that this suit was disposed of upon demurrer to the complaint (Transcript, p. 95) resulting in the final defeat of the plaintiffs in this court; *Powers v. Slaght*, 180 U. S. 173. The question of title of the right of way under the act of 1875 was not pleaded or litigated in the former suit.

ASSIGNMENTS OF ERROR.

1. The court erred in holding that the Railway Company had no right of way under the act of Congress of March 3, 1875.

2. The court erred in holding that the statute of limitations of Washington could not, because the laws of the United States forbade, commence to run until patent issued.

ARGUMENT.

(A) Section 1 of the act of Congress of March 3, 1875, provides:

> "That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road."

Section 3 is as follows:

> "That the legislature of the proper Territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned; and where such provision shall not have been made, such condemnation may be made in accordance with section three of the act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes, approved July first, eighteen hundred and sixty-two,' approved July second, eighteen hundred and sixty-four."

The Spokane Company in 1886 filed proof of its incorporation as required by the act, and in 1886 and 1887 built its railway while the lands were public lands of the United States free from any claim of record. While the defendant in error had lived on the lands since 1883, he had never en-

tered or attempted to enter them as a homestead, though they were surveyed and were subject to entry. *Hewitt v. Schultz,* 180 U. S. 139. The supreme court of Washington held that the act of 1875 did not operate upon this land (it being subject to a possessory claim) *until* that claim was condemned or acquired (Transcript, pp. 206-207), while we think it clear that the act attached as a grant *in praesenti,* conveying a good title when the road was completed, in so far as the United States had a title to convey and *subject* to the possessory right. It is submitted that this is the necessary result of the decisions in *Noble v. Union River Logging Co.,* 147 U. S. 165, 172, and *Jamestown and Northern R. R. Co. v. Jones,* 177 U. S. 125. In the latter case the land was, when the road was located and built, subject to pre-emption claims of record; and the court held that the grant was one *in praesenti,* consummate upon the construction of the road (though no map was filed) and that it took effect upon the land *subject to* the pre-emption claims. This doctrine is wholly different from that prevailing as to ordinary congressional land grants. As said by the court in *Railroad Company v. Baldwin,* 103 U. S. 426:

> "The language of the act here, and of nearly all the congressional acts granting lands, is in terms of a grant *in praesenti.* The act is a present grant, except so far as its immediate operation is affected by the limitations mentioned. 'There is hereby granted' are the words used, and they import an immediate transfer of interest, so that when the route is definitely fixed the title attaches from the

date of the act to the sections, except such as are taken from its operation by the clauses mentioned. * * *

"But the grant of the right of way by the sixth section contains no reservations or exceptions. It is a present absolute grant, subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purposes designed. Nor is there anything in the policy of the government with respect to the public lands which would call for any qualification of the terms.

"Those lands would not be the less valuable for settlement by a road running through them. On the contrary, their value would be greatly enhanced thereby. * * * For any loss of lands by settlement or reservation, other lands are given; but for the loss of the right of way by these means, no compensation is provided, nor could any be given by the substitution of another route. * * *

"We see no reason, therefore, for not giving to the words of present grant with respect to the right of way the same construction which we should be compelled to give, according to our repeated decisions, to the grant of lands had no limitation been expressed. We are of opinion, therefore, that all persons acquiring any portion of the public lands, after the passage of the act in question, took the same subject to the right of way conferred by it for the proposed road."

If, as held in *Jamestown and Northern v. Jones*, the right of way grant made by the act of 1875 takes effect *immediately* upon lands subject to preemption claims, it cannot but follow that it similarly takes effect upon land subject to "possessory rights." And this conclusion conforms to the language of the act, which says: "That the right of

way through the public lands of the United States *is hereby granted"*; and "That the legislature of the proper Territory may provide for the manner in which private lands and *possessory claims* on the public lands of the United States may be condemned." See *Washington and Idaho Railroad v. Osborn,* 160 U. S. 103, and *Spokane Falls and Northern Railway Co. v. Ziegler,* 167 U. S. 65.

That public lands subject to *possessory claims* are subject to the disposal of Congress is well settled. *Northern Pacific Railroad Co. v. Colburn,* 164 U. S. 383 and cases cited. *Simmons v. Ogle,* 105 U. S. 271; *Water and Mining Co. v. Bugbey,* 96 U. S. 165; *Lansdale v. Daniels,* 100 U. S. 113.

The issuing of a patent to Slaght without reservation or exception of the right of way does not operate to free the land from that right. As said by the Secretary of the Interior in 20 Land Decisions, 133, with respect to the necessity for inserting in patents a reservation of rights of way:

> "Under the act of March 3, 1875 (*supra*), such protection does not appear to be necessary. The act itself affords ample protection to the company if it has any rights which the courts may hereafter determine have not been forfeited. The language of section four of said act is, 'and thereafter all such lands over which such right of way shall pass, shall be disposed of, subject to such right of way.' These lands are then disposed of, subject to such right of way, by virtue of the statute.
>
> "This is not a direction to the land department to insert limitations and restrictions in the final certificate and patent, but a legislative declaration of the reservation of a right of way to such railroad companies as may

> have complied with the law. The insertion of the right of way clause would answer no purpose except to embarrass the settler, and leaving it out does not affect the rights of any railroad company under said act."

(B) If we are correct thus far, it is obvious that the error pointed out of the court below is the basis of its opinion. The learned court (Transcript, p. 207) approves its previous decision in *Kakeldy v. Columbia and P. S. Ry.*, 37 Wash. 675, saying:

> "An owner of land, who stands by and without protest sees a railroad constructed thereon, is estopped to thereafter maintain an action in ejectment or suit for injunction to prevent the operation of the road. *His remedy is limited to an action for damages for his compensation.*"

The same doctrine was held in *Roberts v. Northern Pacific Railroad Co.*, 158 U. S. 1, and *Northern Pacific Railroad Co. v. Smith*, 171 U. S. 260.

The court below professed to adhere to the rule last stated. The point of its decision was that *no* statute of limitation of the state of Washington *could* commence to run before patent issued, *for the reason* that until then title was in the United States, *the act of* 1875 *not passing title to the railway company because of the possessory claim.* It will be seen that the proposition controlling the learned court's opinion was that *title to the right of way was in the United States until the patent issued to Slaght, and by that instrument passed to him;* or in other words that the act of 1875 did not

operate upon the title until the possessory claim was condemned.

The Washington statute of limitations for the recovery of land is ten years and the statute for the recovery of damages a shorter period.

But the court held that its own statute of limitation could not apply because this court had so held in *Gibson v. Chouteau,* 13 Wall. 92, and *Redfield v. Parks,* 132 U. S. 239. And this certainly cannot be the law if the title vested in the Railway Company by the act of 1875, *subject to the possessory claim.* The doctrine of the two decisions of this court relied upon extends only to actions *dealing with the title itself* before it has passed from the United States.

It is entirely clear that one occupying public land may protect his *possessory right* before patent. It is clear upon the decisions of this court that he would be protected by injunction or by any other proper remedy against a railway claiming under the act of 1875; *Washington and Idaho R. R. Co. v. Osborn,* 160 U. S. 103; *Spokane Falls & Northern Ry. Co. v. Ziegler,* 167 U. S. 65; and other courts have held that he will be protected by any appropriate action; *Brown v. Hartshorn,* 12 Okla. 121; *Woodruff v. Wallace,* 3 Okla. 355, and cases cited; *French v. Cresswell,* 13 Oregon, 418; *Burlington, etc., R. R. Co. v. Johnson,* 38 Kan. 142; *Wendel v. Spokane County,* 27 Wash. 121. See also *Pierce v. Frace,* 2 Wash. 81.

If the right of the defendant in error is only to recover damages, then the ruling of the state court,

that the statute of limitation could not run until patent, is clearly erroneous. Regardless of whether this action is one for damages or one to recover possession, the ruling is erroneous if the title vested in the railway company subject to the possessory claim. For if the title vested in the railway company under the act of 1875 as we contend, defendant in error could not maintain ejectment *either before patent or after,* while he could by several actions and suits, either in the state or federal court, protect his possessory claim, recover damages for its violation, or enjoin the railway from intruding upon it.

The injustice of the defendant in error's position so impressed the court below that it awarded to the railway company twenty-five feet of right of way and a depot site one hundred feet wide. Why this result it is impossible to say, for if the court below is right, the railway had as little right to that part of the land it occupied as to the balance. Other questions might be suggested, but perhaps not federal. The question of the interpretation of the act of 1875 is a federal question and the controlling and only question in the case.

(C) The decision in *Wiggins Ferry Co. v. Ohio & Mississippi Ry. Co.,* 142 U. S. 396, 410, seems to settle that the former litigation terminating in *Powers v. Slaght* is not *res adjudicata.* See also *Gilman v. Rives,* 10 Peters, 298; *Freeman on Judgments* (4th ed.), sec. 267; *Van Fleet Former Adjudication,* sec. 306 and following.

These authorities settle that where the judgment

in the former action is upon demurrer to a complaint, the estoppel extends only to the very point raised in the pleading and does not bar another action based upon other facts. In the case at bar the findings (Transcript, pp. 94-5) show that the complaint in the former suit pleaded a special title alleged to be in fee simple absolute to the whole section, viz: a title by selection as indemnity under the grant made by Congress to the Northern Pacific Railroad by the act of July 2, 1864. The judgment was upon demurrer to the complaint and its effect was *only to decide against the title specially set forth in that pleading.* In this action the right asserted is a perpetual easement or way by virtue of the act of 1875 through the lands involved in the former suit. Not only was this right not pleaded in the former complaint, but under it the title now asserted could not have been proved.

CHARLES W. BUNN,
JAMES B. KERR.